In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-161

CATHERINE DECAMP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This wrongful death action against the United States was brought by the widow of the decedent under the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680.[1] The United States had awarded a contract to the decedent's employer, R. H. Beecham, for the removal and disposal of debris along the Salinas River near San Luis Obispo, California. Prior to the bidding on this segment of the project, Beecham and other prospective bidders toured the area with the government's resident engineer. One or more of the prospective bidders had specifically inquired whether the government would require the successful bidder to have its tractors or bulldozers equipped with canopies or

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[1] The workmen's compensation insurance carrier for decedent's employer intervened, claiming that it was entitled to a lien on any judgment in favor of petitioner for the amount of workmen's compensation benefits paid by it to petitioner.

roll bars (Tr. 16, 35, 42, 45, 68, 93, 108).[2] The resident engineer stated that he did not think canopies were necessary for the particular project, and he advised the bidders that he would not require canopies or roll bars installed on the project (Tr. 54, 108).

The district court found, on the basis of other evidence, that the "custom and practice" among owners and operators of heavy equipment in the Salinas River area was not to use canopies or roll bars on their tractors for debris clearance projects (R. 47, 55).

The contract that Beecham entered into required the contractor to comply with pertinent provisions of the Corps of Engineers Safety Manual. Provision 18-20 of the Manual provides:

> Suitable protections against the elements, falling or flying objects, swinging loads, and similar hazards shall be provided for operators of all machinery and equipment. * * * All bulldozers, tractors or similar equipment used in clearing operations shall be provided with substantial guards, shields, canopies, or grills to protect the operator from falling or flying objects as appropriate to the nature of the clearing operations undertaken.

The decedent was fatally injured while attempting to clear a live willow tree with his bulldozer. As he was pushing on a lower limb of the tree with his bulldozer the limb slipped over the top of the tractor's brush rake and struck him. There was testimony that a canopy guard would have

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[2] "Tr." refers to the transcript of testimony in the district court; "R." refers to the record in the court of appeals.

prevented the limb from striking the decedent (Tr. 78).[3]

The district court held, on the one hand, that Beecham was not negligent in failing to equip his tractors with canopy guards (R. 47).[4] On the other hand, it held that the government was negligent in not *requiring* Beecham to equip his tractors with canopies (R. 41, 46).

The court of appeals reversed (Pet. App.). It held, with one judge dissenting, that the district court applied an incorrect legal standard in concluding that the provision of the Corps of Engineers Safety Manual required canopies in the circumstances of the particular clearance project in this case. The provision specified that canopies must be used only where "appropriate to the nature of the clearing operations undertaken." Construing "appropriate" to mean "specially suitable" (Pet. App. 9), the court of appeals stated that "[i]n light of the prevalent practices of contractors in the area here involved, as well as the undisputed testimony that from a safety standpoint the use of canopies was not indicated for the debris clearance, the only reasonable inference is that the canopies were not specially suitable for the project" (*ibid.*) The court thus concluded that the government's engineer was not negligent in failing to require canopies on Beecham's bulldozers (*ibid.*).

The decision of the court of appeals is correct, and there is no reason for review by this Court.

[3] There was also evidence that the decedent had been warned on several occasions in the previous week about "operating [his bulldozer] a little bit too eagerly" (Tr. 53). His supervisor had "told him to slow down, be careful" (*ibid.*). And he was specifically instructed not to knock down live growth (Tr. 56).

[4] The question of Beecham's negligence was presented because under California law the intervenor, Beecham's insurance carrier, could impose a lien on petitioner's judgment only if Beecham himself had been faultless. *Witt* v. *Jackson*, 57 Cal. 2d 57, 366 P. 2d 641.

1. Petitioner contends (Pet. 5-6) that the Safety Manual imposes a "special duty on the Government" and that the decision below, in failing to recognize this, conflicts with that of another circuit. But this case presents no conflict, because the court of appeals found it unnecessary to resolve the "special duty" issue. It stated (Pet. App. 8):

> We need not re-examine this problem, however, because we are convinced that even if we concede that such a duty was created by the manual, the duty did not encompass the risk of the type of accident that here occurred.

2. Petitioner also claims (Pet. 6-9) that the court of appeals erred (a) in reversing the district court's finding of negligence without applying the "clearly erroneous" test, (b) in relying on the custom and practice of local contractors in determining that canopies were not required under the Safety Manual for the clearance project in this case, and (c) in giving "primary consideration" to the contractor's negligence. None of these contentions has merit.

First, the court did not profess to reject the district court's findings of fact. It held only that the district court applied an erroneous legal standard in construing the Safety Manual provision to require canopies without regard to their suitability under the particular circumstances of a given project (Pet. App. 8). Second, it was perfectly proper for the court of appeals to consider the local custom with respect to the use of canopies in clearance projects. That custom, together with the testimony that canopies were not required for safety in clearance projects, had a direct bearing on whether the government's engineer was negligent in determining that canopies were not necessary for this project.[5] Third, the court did not

[5] Petitioner appears to argue (Pet. 7) that the government owed a "non-delegable duty" to the decedent. If this is meant to suggest that

give "primary consideration" to the contractor's negligence; nor did it hold, as petitioner suggests, that "the Government could not be negligent without the contractor also being negligent" (Pet. 8). It merely determined that, under the Safety Manual and in the circumstances of this clearance project, the government's engineer did not breach any duty owed to the decedent by failing to require canopies on Beecham's bulldozers. Though the result is that neither the government nor the contractor was held to be negligent, the questions are discrete and were properly treated as such by the court below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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the government can be held liable absolutely and without regard to fault, the argument is foreclosed by this Court's decisions in *Laird* v. *Nelms*, 406 U.S. 797, 799, 803, and *Dalehite* v. *United States*, 346 U.S. 15. See also *Logue* v. *United States*, No. 72-656, decided June 11, 1973, slip op., p. 7, n. 7.